

"emergency" which was an overall concept is transferable to these regulations for implementing § 107 of the Hazardous Materials Transportation Act. The other basis was the impracticability of other forms of transportation. Regardless of the logic and soundness of this second basis, it is not by itself recognized by § 107 of the Act as a legitimate basis for the Bureau declaring that an emergency exists. The necessity to eliminate this second basis for emergency exemptions has caused great concern by interests in Alaska which has traditionally accounted for more than 75% of all relief granted under 14 CFR 103.5.

After reviewing the case-by-case history of actions taken under 14 CFR 103.5, the Bureau, on September 26, 1975, initiated rule making (40 FR 45197, October 1, 1975) based on demonstrated favorable safety experience thereunder. It is expected that such regulations will eliminate the need for several classes of reoccurring emergency exemptions for Alaska and other remote areas where a cargo-only aircraft is the only practicable means of transportation. To allow for finalization of this related proposed rule making, the Bureau is adopting certain transition procedures set forth in § 107.125 which will enable it to respond to the special situation in Alaska. To ensure that the needs of the citizens of Alaska are properly served during the transition period which the Bureau expects to be completed by January 16, 1976, the FAA and the Bureau have arranged for all essential exemption activities and decisions to be made in Alaska. For example, the "official designated by the Director, OHMO," to perform certain Bureau functions under § 107.125 will be stationed in the FAA Regional Office in Anchorage.

The Bureau feels that these steps, when fully completed, together with the modifications made in these regulations, will result in an accommodation of the well-articulated needs of persons in Alaska and at the same time fully satisfy the procedural requirements prescribed by the Hazardous Materials Transportation Act.

In response to recommendations that applications for emergency exemption be treated separately from general applications, the Bureau has grouped all provisions relating to the application for and processing of emergency exemptions into a separate distinct section (§ 107.113). In so doing and in response to related comments, provision has been made for making application through FAA District Offices in the case of air commerce and for 24-hour telephone numbers for the other modes of transportation.

#### DETERMINATION OF EXISTING EMERGENCY

The proposed criteria for determinations as to whether or not an emergency exists evoked a wide range of comments. At one extreme was a recommendation that the proposed criteria for making determinations be converted to flat declarations that an emergency does in fact exist when, in the view of an applicant, any of the described conditions occur

(i.e., risk to life or property or the chance of serious economic loss). At the other extreme was an assertion that an emergency exists only if there is "an imminent risk of a substantial injury to human health, welfare or life itself which is not outweighed by the public's statutory right to know of and participate in the pending exemption proceeding." The author of the latter comment would further restrict his narrow concept of emergency by providing that "no relief should be available where it appears that the applicant himself has induced or provoked the alleged emergency by unnecessarily delaying his filing." To deny an applicant the means to abate a danger to his own "health, welfare or life" is an unreasonable penalty to impose for late filing of an application. Such a penalty is unconscionable when, as in most such cases, the danger is to the health, welfare or life of innocent third parties rather than that of a dilatory applicant.

In between these extremes were suggestions that express recognition should be given to cost/benefit considerations and seasonal movement of products such as agricultural chemicals, and that lack of other forms of transportation should be considered to be an emergency authorizing the use of aircraft along the lines of present 14 CFR 103.5. A few commentators stated that there was a need for the criteria to be more specific, particularly with regard to the term "serious economic loss". One such commentator sought specificity as to whose economic loss (e.g., shipper, carrier, consignee, general public) is to be considered under the criteria. Another commentator asserted that the criteria were not sufficiently specific to inform him as to how he could frame an application guaranteed to qualify it for emergency treatment. Another commentator complained that an emergency had not been "totally defined".

One commentator stated that there appeared to be no reason for the parenthetical expression in the protection of life and property criteria which excludes "the hazardous material to be transported" from the class of property for which an emergency exemption can be sought. This exclusion was proposed because the Bureau means to limit emergency determinations under that criterion to situations in which there is an urgent need for the hazardous material concerned to be (1) delivered elsewhere in order to alleviate a condition posing a threat to life or property, or (2) moved from its present location in order to protect life or property from the hazards the material may present.

The commentator who would limit "emergencies" to situations involving risk to health, welfare or life on the theory that the governing statute (§ 107(d) of the Hazardous Materials Transportation Act) so requires, reads into the statute words of limitation that simply are not there. Those who seek specificity to precisely cover a particular factual situation would have the Bureau so narrow the criteria as to risk freezing out other legitimate emergency situations that surely will arise.

Several comments concerned the manner in which the emergency determination authority should be exercised under the proposed criteria. Although it does not consider it necessary or appropriate for inclusion in the regulations, the Bureau finds considerable merit in one commentator's admonition that "the finding that an emergency exists must result from a balancing of all of the relevant information available to the Department." The Bureau intends to do precisely this in making emergency determinations, particularly those which will be made under the "serious economic loss" criteria of § 107.115(b). While the Bureau fully anticipates that its emergency determinations under the "serious economic loss" criteria will nearly always be limited to situations in which the hazardous material concerned needs to be delivered elsewhere to prevent serious economic loss, it recognizes also the possibility of that infrequent instance when a manifest injustice or absurdity could result if the criteria is literally limited to needed deliveries.

Various elements of the Department of Defense (DOD) expressed the view that certain of their shipments of hazardous materials which require exemptions when transported by commercial carriers should be entitled to emergency exemptions in the interest of national defense. Two U.S. Army commentators recommended that such emergency exemptions should be granted for "shipments to be made by or for the DOD in support of the national defense program, when certified by the DOD as essential and critical." The Naval Sea Systems Command requested a "grandfather clause for DOD Special Permits in order that the transportation of DOD weapons systems/components will not be disturbed."

The Bureau does not find authority in law which would authorize it to adopt any of the DOD proposals for grandfather clauses or DOD certifications. The responsibility vested in the Secretary of Transportation by § 107(d) of the Hazardous Materials Transportation Act to determine that an emergency exists must be carried by him or by one of his subordinates within his Department. It cannot be transferred horizontally to another Executive Department. In addition, the Bureau believes that those determinations can only be made case-by-case on the basis of existing circumstances.

Comments from the Air Force question the need for requiring them to reapply biennially for an exemption issued in 1961 for an indefinite period. The provisions of §§ 107(a) and 114(b)(2) of the Hazardous Materials Transportation Act are controlling on this point. Section 114(b)(2) operates to terminate the Air Force exemption and any other similar indefinite exemptions on January 4, 1977, unless renewed before that date, in accordance with regulations issued under § 107 of the Act. That section, under which the current regulations are being issued, does not allow any exemption or renewal thereof to be issued for more than a two-year term. As their comments suggest, a properly framed petition for